



Land Use and Long
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BOARD OF ZONING APPEALS

MEETING MINUTES

JULY 25, 2013

AGENDA

NEW CASE:

- 1. Indian Run Meadows PUD – Shoppes at Athenry – Dairy Queen 7106/7196 Muirfield Dr
13-071AA Administrative Appeal**

(Uphold 3 -0.)

Mr. Todoran opened the meeting with the announcement that the Chairman, Mr. Page and Vice Chairman, Mr. Gunnoe, were absent this evening. Other Board members present were Mr. Zitesman and Mr. Myers. City representatives present were Tammy Noble-Flading, Claudia Husak, Jonathan Lee, Andrew Crozier, Jennifer Readler, and Flora Rogers.

Mr. Todoran called the meeting to order.

Motion and Vote

Mr. Todoran moved, and Mr. Zitesman seconded, to accept the documents into the record. The vote was as follows: Mr. Myers, yes Mr. Zitesman, yes; and Mr. Todoran, yes. (Approved 3 – 0.)

Mr. Todoran confirmed that there were no amendments or corrections to the May 23, 2013 meeting minutes and requested a motion.

Motion and Vote

Mr. Zitesman moved, and Myers seconded, to approve the May 23, 2013 meeting minutes as presented. The vote was as follows: Mr. Todoran, yes; Mr. Myers, yes; and Mr. Zitesman, yes. (Approved 3 – 0.)

Administrative Business & Communications

Ms. Noble-Flading announced that there is nothing to add to the newsletter that was sent.

Mr. Todoran asked that anyone who wanted to address the Board on the case this evening please stand and be sworn in. He administered the oath to the applicant, audience and staff. He introduced the case.

- 1. Indian Run Meadows PUD – Shoppes at Athenry – Dairy Queen 7106/7196 Muirfield Dr
13-071AA Administrative Appeal**

Mr. Todoran announced the case number and the presenter as Claudia Husak.

Ms. Husak thanked the Chair for introducing this application. She stated that Planning had received correspondence from an adjacent resident which was forwarded to the Board members. She stated that this is a request for an Administrative Appeal that is for the shopping center at the Shoppes at Athenry.

The appeal is to a decision made by Planning regarding the permitted uses for this development. She stated that the site contains two buildings that are L- shaped and total 26,000 square feet. She stated the development history was included in the Planning Report and begins with the approval of the Indian Run Meadows PUD in 1978 and a final development plan that was approved in 1997. Ms Husak stated that there were several applications that the Planning and Zoning Commission, as well as City Council, have reviewed. She said that Planning was approached by the owners of a Dairy Queen franchise to occupy a tenant space within the shopping center. She stated that on July 3, 2013, Planning determined that the proposed operations of a Dairy Queen within the shopping center would fall under the classification of fast food and therefore, would not be a permitted uses of the shopping center. She stated that the applicant is therefore, requesting an Administrative Appeal to the Board of Zoning Appeals to reverse that decision by Planning. She stated that the appeal procedures are essentially the Board is to determine whether or not the decision that was made by staff was done so using the proper requirements. She stated that the Board is limited to the information that was available to the administrative official, at the time the decision was rendered.

Ms. Husak stated that the appeal is to a staff decision that considers an ice cream shop to be fast food and not a full line restaurant and therefore, prohibited under the Indian Run Meadows Development text. She stated the text permits uses that are listed in the Neighborhood Commercial district, including eating and drinking establishments that are full line restaurants and exclude fast food or drive-in restaurants. She stated that the Zoning Code does not include the definition for fast food and in those instances staff utilizes the dictionary. She stated the definition generally defines fast food as an establishment that specializes in food that can be prepared and served quickly and is designed as "ready and available for user consumption". She stated that the development text lists full line restaurants as permitted uses within the shopping center, and requires tables that serve people. She stated that the Zoning Code utilizes Standard Industrial Classifications that lists restaurant as intended to be full line restaurants for this particular shopping center. Ms. Husak stated that the shopping center has very long history of requests and development that include a discussion at City Council on May 21st, when Mary Kelley's proposed some outdoor seating. She stated that Mary Kelley's is a restaurant that is operating within the shopping center and during that discussion, it was reiterated that the intended uses for that center were neighborhood serving uses. She stated that this further supports the decision to consider Dairy Queen a fast food restaurant.

Mr. Zitesman asked if staff considered any other information than what was presented.

Ms. Husak said they did not.

Mr. Todoran asked the applicant if he would like to come forward and make any comments.

Mr. Michael Kelley, representative for Dairy Queen, stated that he had a presentation and would like to examine a witness, if possible. He also stated that he would like to ask Ms. Husak some questions.

Ms. Readler asked that the reference materials be presented for review, while he continues his presentation.

Mr. Kelley introduced Ms. Carolyn Tanner, 8062 Smokey Row Road, Powell, OH 43065.

Mr. Kelley asked Ms. Tanner where she is from.

Ms. Tanner replied that she is from Powell.

Mr. Kelley asked where she grew up.

Ms. Tanner responded that she grew up in Dublin; graduated from Dublin High School and a long time Dublin resident.

Mr. Kelley asked her if she were here today because she owned Dairy Queen.

Ms. Tanner said yes. She further stated that they would like to locate in Dublin and this establishment would be a continuation of the franchise that they own, which opened in 1997 in Perimeter Shopping Center. Ms. Tanner stated that in 2003 they moved the existing franchise over to Sawmill Road and were open until 2012.

Mr. Kelley asked if they had any other community involvement within Dublin relating to the sale of ice cream.

Ms. Tanner responded that ever since their inception in 1997, we've been involved in the community as far as trying to be involved with the schools, with the PTO's and fundraising in ice cream days, donate ice cream to the Convolarium at Indian Run, work with the Friendship Village, and are involved with sponsoring football camps at both Coffman and Scioto high schools.

Mr. Kelley asked Ms. Tanner to describe the new concept for the proposed Dairy Queen.

Ms. Tanner responded that when we opened up in 1997, there were basically two kinds of Dairy Queens available as a franchise. There was a Dairy Queen Brazier, which was basically a full line restaurant with hamburgers, hot dogs, french fries, chicken strips, as well as ice cream. She stated that the other concept was simply Dairy Queen, which is only seasonally and serves only ice cream. She stated that when they looked at the proposed tenant space and the community that surrounds it, they considered a new concept called a Dairy Queen Grill and Chill. Ms. Tanner said the Grill and Chill concept or the Dairy Queen Brazier is typically what you find around central Ohio and the Columbus area.

Mr. Kelley said he wanted to talk about the concept that you propose to bring to the Shoppes of Athenry. He asked if they sell primarily ice cream.

Ms. Tanner responded yes.

Mr. Kelley asked if it would include a drive thru.

Ms. Tanner responded there will be no drive-thru.

Ms. Kelley asked if they're restaurant have a grill.

Ms. Tanner said no.

Mr. Kelley asked if it would have any type of fryer.

Ms. Tanner said no.

Mr. Kelley asked if they would serve hamburgers.

Ms. Tanner said no burgers, french fries, or chicken strips.

Mr. Kelley asked what food would be sold.

Ms. Tanner said that there are two food items that are required by Dairy Queen, which are hot dogs and barbeque sandwiches.

Mr. Kelley said that at this time he would like to offer into evidence the financials records that were shown at the meeting with staff on July third.

Ms. Readler stated that they have looked at the documents and there is extensive information that was not submitted as part of the application. She stated that Mr. Kelley would need to proceed without the submission of the information based on the fact that it is new evidence which was not provided at the time the decision was made.

Mr. Kelley said he would continue with his presentation.

Mr. Zitesman asked if the only question the Board is addressing is if the determination made by Planning was correct when they determined that a Dairy Queen is a fast food restaurant.

Mr. Kelley said that the information that he is attempting to present was based on that determination. He stated that the financial information breaks down the type of operations.

Mr. Zitesman asked if these are only projections.

Mr. Kelley said what the information is an amalgamation of 100 nationwide Dairy Queen stores that fit this concept and their cumulative percentage of sales.

Mr. Zitesman said that staff projected food sales as 10% and that was the information the Board would review.

Mr. Kelley said that there were two separate categories of food: one was 5% and one second was 5%. He stated that the proposed restaurant would only offer one of the two categories of food and therefore, the percentage of food sales is 5%.

Ms. Husak said that the information provided in the staff report was based on a meeting in July 2013. She stated that the detail statements were not included in the application.

Mr. Zitesman asked Mr. Kelley proceed and be focused on the discussion before the Board.

Mr. Kelley asked Ms. Tanner what percentage of sales were hot dogs and barbeque sandwiches.

Ms. Tanner said approximately 5%.

Mr. Kelley asked if there would be indoor seating.

Ms. Tanner said they are proposing approximately 14 to 16 seats.

Mr. Kelley said that's all he had for Ms. Tanner.

Mr. Kelley asked if she was aware that in approximately 1998 the city permitted a coffee shop the shopping center

Ms. Husak said she did not know.

Mr. Kelley asked if she was aware of Marco's Pizza that was in the shopping center.

Ms. Husak said yes.

Mr. Kelley asked if she was aware of Papa John's is currently in the shopping center.

Ms. Husak said yes.

Ms. Kelley said that that Papa John's is carry out and delivery only business.

Ms. Husak said she is not aware of their detailed operations.

Mr. Kelley asked if she was aware if there is any indoor seating in that shop.

Ms. Husak said no.

Mr. Kelley asked if she was aware that in approximately 2000 the City of Dublin permitted an ice cream shop in the center.

Ms. Husak said no.

Mr. Kelley asked if she would consider Papa John's to be a full line restaurant.

Ms. Readler stated that she thinks we're speculating and not addressing the issue before the Board.

Mr. Kelley asked Ms. Husak if staff is being stricter in terms of the permitted uses since 2012.

Ms. Husak said yes.

Mr. Myers asked if there was additional information that needed to be submitted regarding the use determination.

Mr. Kelley said the facts that are being presented go directly towards the operations of the Dairy Queen.

Mr. Zitesman stated that the text clearly states that uses shall not include fast food. He asked Mr. Kelley to address why their proposed use is not fast food.

Mr. Kelley said the text states that permitted uses shall be those listed in the Neighborhood Commercial district which lists eating and drinking establishments.

Mr. Zitesman said that the text also states that it "shall not" include fast food.

Mr. Kelley said yes, then it says "shall not include" and it lists fast food restaurants. He said that if you look at the SIC list, it clearly is referring to uses that it prohibits such as drive-in restaurants, fast food restaurants, nightclubs, cabarets, etc. He stated that it does not prohibit ice cream stores.

Mr. Zitesman asked what standard of proof is Mr. Kelley utilizing in his analysis of this case. He asked if it was "convincing evidence" or "preponderance of the evidence".

Ms. Readler said that the Board review of the case is stated in the Code. She stated "in deciding the appeal, the Board shall determine whether or not the decision that was made was done so using the proper requirements and standards in this Code".

Mr. Zitesman asked Mr. Kelly if he is now stating that the proposed use is an ice cream stand.

Mr. Kelley replied yes.

Mr. Zitesman said that if Wendy's comes in and says they would like to serve only Frosty's, would Mr. Kelley no longer consider the establishment a fast food restaurant.

Mr. Kelley replied if you look at all the definitions that are cited by staff, it includes the SIC manual. He said this manual determines uses based on what the primary operations of a business. He stated that if Wendy's were selling Frosty's and only 2% of their sales would be salad, it would not be a fast food restaurant.

Mr. Zitesman asked what other restaurants that are currently occupying the center"

Ms. Husak stated that to her knowledge an Asian restaurant, Mary Kelly's and a wine shop.

Mr. Zitesman thought there was a sushi place in the plaza.

Mr. Kelley said he's not asking the Board to change the text, but rather he is asking the Board to interpret the text.

Mr. Myers said he agrees with Mr. Zitesman that the text stated it "shall not include fast food".

Mr. Kelley said I think the question to you is whether the City is being too strict in their interpretation. He stated that the City is saying is that fast food is anything that specializes in food that is readily available. He stated that this prohibits fast food drive-ins but permits ice cream stands.

Mr. Zitesman noted that there were several other people who would like to make comments.

Mr. Todoran asked if anyone present from the public who would like to comment on this application.

Mr. Thomas McCash (55 South High Street, Suite 210, Dublin, Ohio). Mr. McCash stated that he agreed that the issue before the Board is fairly simple. He stated that the issue is whether or not this is fast food establishment. He said that the Board was presented testimony from Ms. Tanner that stated there are two different types of Dairy Queens. He said there is the Brazier, which she classified as a full line restaurant and there is their other concept, which is fast food. Ms. Tanner stated that she is doing the later type of establishment. Mr. McCash stated that McDonald's is a fast food establishment. He stated that it has a separate category in the SIC manual. He also said the SIC classifications can change on a daily basis based on the federal government. He stated that you could look at Justice Stewart in another Ohio case that deals with pornography. Mr. McCash stated that the courts differentiate various types of pornography and that Justice Stewart concluded "I know it when I see it". He stated that is what is occurring this this proposal. He said the SIC code doesn't say anything about full line restaurants. He said that fast food restaurants have additional issues with trash, traffic, etc. He said that's why the neighbors argued against fast food establishments when the development was originally approved. He stated that they have been arguing for the same exact issues throughout the entire time that the center has been open.

Mr. Todoran asked if anyone else wish to address the Board.

Ms. Gayle Reynolds (7079 Calvary Court, Dublin) said that Mr. McCash represents me and several of the other neighbors, but she wanted to give you a little bit of my perspective as a homeowner who lives adjacent to the shopping center. She stated that one of your key decisions, before we even decided to buy this property, was the restrictions on the center. She said the Code prohibits fast food. She stated that she didn't want to be adjacent to the noise, the trash, and traffic associated with fast food establishments. Ms. Reynolds stated that her house is about 50' from my property line to that shopping center. She stated that she has been to every Planning & Zoning meeting attempting to express concern for issues associated with the center. She stated that the other big concern I have is they're coming in there and have a limited menu but that is still fast food. She stated that the internet lists Dairy Queen as the number nine fast food restaurant. She stated that Zagot, also listed them as fast food. She stated that fastfood.com also lists Dairy Queen. She stated that Dairy Queen is fast food and it doesn't matter if they're only going to serve ice cream, hot dogs and barbeque sandwiches. She stated that they are fast food. Ms. Reynolds stated that if you put it in a wrapper or serve it on a tray or you put it in a plastic carton, it is fast food.

Mr. Todoran asked if there was anyone else that would like to speak (no response). He closed the public portion of the discussion and will opened the discussion up to the Board.

Mr. Zitesman said he would like to be clear, the Tanners have been good corporate citizens to Dublin and this is in no way talking about the Tanners' themselves. He stated that in his opinion of it is it fast food. He said the issue is what is appropriate for this center and whether the proposed use complies with the text.

Mr. Myers said that he agrees that these are the issues. He stated that the issue is what the district is zoned and what it permits.

Mr. Todoran made a motion, seconded by Mr. Zitesman, to uphold Planning Commissions' determination that a proposed Dairy Queen store is considered a fast food restaurant and does not qualify as a full line restaurant, and therefore not a permitted use under the Indian Run Meadows Development text.

The vote was as follows: Mr. Myers, yes; Mr. Zitesman, yes; Mr. Todoran, yes. (Uphold 3 – 0.)

Mr. Todoran adjourned the meeting at 7:43 p.m.

As approved on October 24, 2013 by the Board of Zoning Appeals.